

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
AVERY'S MARKET, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1983	:	
through May 31, 1986.	:	

Petitioner, Avery's Market, Inc., 10833 Main Street, North Collins, New York 14111, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1983 through May 31, 1986 (File No. 804343).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 65 Court Street, Buffalo, New York, on July 29, 1988 at 9:00 A.M. Petitioner appeared by Martin Sanders, C.P.A. The Audit Division appeared by William F. Collins, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division's denial of exemption from imposition of sales and use taxes with respect to certain purchases of electricity and natural gas consumed in the operation of petitioner's supermarket was proper.

II. Whether the method used by the Audit Division to determine the amount of exempt kilowatt-hours of electricity consumed by certain equipment in petitioner's supermarket was proper.

III. Whether the Audit Division's computation of petitioner's exempt purchases of natural gas was proper.

FINDINGS OF FACT

1. On December 31, 1986, the Audit Division issued to petitioner, Avery's Market, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$1,566.47 in tax due, plus interest, for the period December 1, 1983 through May 31, 1986. The notice of determination was issued following a review of petitioner's sales tax returns on which petitioner claimed a credit for sales tax paid on certain purchases of electricity and natural gas during the period covered by the notice.

2. The claimed credit was premised upon petitioner's contention that certain of its purchases of electricity and natural gas were consumed directly in production and were therefore exempt from sales tax.

3. Petitioner claimed a total of \$3,660.00 in sales tax credits on its returns for the period at issue. Based on a review of information submitted by petitioner in connection with its claim for credit, the Audit Division determined that \$2,093.53 of such credit was properly taken and issued the notice of determination herein for the improperly claimed difference of \$1,566.47.

4. Petitioner owns and operates a supermarket in North Collins, New York. During the period at issue, petitioner's store was open six days a week from 8:00 A.M. to 9:00 P.M. and on Sundays from 8:00 A.M. to 5:00 P.M. On its sales tax returns petitioner claimed exemption for purchases of electricity and natural gas consumed in the operation of equipment in use throughout its store. The Audit Division granted exemption with respect to 25 of the items. The remaining items which were denied the utilities exemption, together with each item's use, were as follows:

<u>Equipment</u>	<u>Use</u>
scale/pricer	Used in produce department to weigh customer purchases of produce and to produce a printed tag listing price and product.
wrapper	Packaged various products before such products were placed in open cases for sale.
meat prep room	Room wherein meats were cut and prepared prior to being placed out for sale.
meat cooler	Storage area for meat.
produce prep room	Room wherein produce was prepared prior to being placed out for sale.
produce cooler	Storage area for produce.

5. The items set forth above as "meat prep room", "meat cooler", "produce prep room", and "produce cooler" were described in information submitted by petitioner to the Audit Division as "meat prep & cooler/produce cooler", a single unit. At hearing, petitioner established that its information submitted was in error in this respect, but petitioner did not submit evidence of the amount of electricity consumed by these items.

6. Petitioner also claimed exemption for purchases of natural gas consumed in the operation of equipment in its store. The Audit Division denied exemption with respect to natural gas consumed in heating petitioner's hot water tank. Hot water from the tank was used to produce steam for proofers in petitioner's bakery. A proofer is a machine which raises dough for bakery products. Petitioner was uncertain as to what percentage of its total hot water use was consumed in the proofers.

7. In making its determinations, the Audit Division accepted as correct the hours of average daily usage for each item as submitted by petitioner.

8. At hearing, petitioner established that its bakery department operated about 15 hours per day and that its meat department operated about 9 hours per day. Petitioner presented no evidence of any changes in the hours of operation of specific pieces of equipment in these departments from that set forth on the information submitted in support of its claim for credit.

9. After making its determination as to which equipment consumed electricity directly in production, the Audit Division sought to determine the proportion of petitioner's purchases of electricity which qualified for exemption from sales tax. To make this determination, the Audit Division first calculated kilowatt-hours for each piece of equipment which it had determined was used in production. With respect to each of the items for which petitioner's survey (see____, Finding of Fact "14", *infra*) listed a horsepower figure, the Audit Division used that horsepower figure to calculate kilowatt-hours by the following formula:

$$\frac{\text{Horsepower} \times 746}{1,000} = \text{Kilowatt-hours}$$

10. With respect to the single exempt item for which a horsepower figure was not set forth in the survey, but for which a voltage and amperage figures were set forth, the Audit Division used such figures to determine kilowatt-hours by the following formula:

$$\frac{\text{Volts} \times \text{Amperes}}{1,000} = \text{Kilowatt-hours}$$

11. With respect to the remaining 13 items for which neither horsepower nor amperage figures were provided, the Audit Division accepted the kilowatt-hours figures set forth in the survey in making its determinations.

12. Application of these two formulas to the same equipment would have resulted in significantly differing kilowatt-hours figures for the same piece of equipment.

13. Having made its determination as to kilowatt-hours of exempt usage consumed by petitioner's equipment and the hours per day of such exempt usage, the Audit Division then calculated the ratio of kilowatt-hours of exempt usage to total kilowatt-hours of usage. This ratio was then applied to the total amount of petitioner's purchases of electricity to determine the amount of such purchases qualifying for exemption. The Audit Division then used petitioner's utility bills to determine petitioner's total kilowatt-hours of usage and its total purchases of electricity.

14. In support of its claim for credit, petitioner submitted to the Audit Division a survey of the electricity consumption of each of the pieces of machinery and equipment for which petitioner claimed exemption with respect to its purchases of electricity. The surveys submitted were prepared on petitioner's behalf by Energy & Value Consultants, Inc., a corporation serving as technical consulting engineers to industries, commercial and private businesses, and governments and municipalities. The firm provides technical consultation on, among other things, energy conservation, energy usage and utilization analysis and planning, air conditioning electrical systems, heating and ventilation systems, and refrigeration systems.

15. The surveys of the equipment at issue, prepared by Energy & Value Consultants, Inc., were based upon field investigations conducted at petitioner's store and interviews with managerial employees at the store. Each piece of equipment for which a utilities exemption was claimed was physically examined by employees of Energy & Value Consultants, Inc. for data

with respect to make and electrical specifications. Energy & Value Consultants, Inc. also conducted interviews with managerial employees to determine the working hours per item.

16. Energy & Value Consultants, Inc. computed the hourly kilowatt usage for each piece of equipment herein by using tables and data published by the National Electrical Manufacturers Association ("N.E.M.A."), an association which publishes information and data accepted and relied upon by electrical engineers and persons within the electrical manufacturing industry. The N.E.M.A. tables relied upon in the survey reflect a common, accepted engineering approach to the computation of kilowatt usage.

17. The surveys conducted by Energy & Value Consultants, Inc. were done under the direction of a qualified engineer, and the results were certified by a professional engineer.

18. With respect to the claimed exemption for purchases of natural gas used in production, the Audit Division determined that gas consumed in the operation of two fryers was consumed in production and accepted petitioner's calculations of the amount of daily consumption by these two items. The Audit Division also accepted petitioner's calculations of its cost of natural gas per day and, based on these calculations, determined that petitioner was entitled to an exemption of \$31.96 per quarter with respect to its natural gas consumption.

19. Petitioner's produce department had a salad bar and also sold prepared salads during the period at issue. Petitioner presented no evidence to show how its produce equipment was used in the making of such salads or the preparation of the salad bar for customer use.

CONCLUSIONS OF LAW

A. Tax Law § 1115(c) provides for an exemption from the sales and use taxes imposed under Tax Law §§ 1105 and 1110 as follows:

"Fuel, gas, electricity, refrigeration and steam, and gas, electric, refrigeration and steam service of whatever nature for use or consumption directly and exclusively in the production of tangible personal property, gas, electricity, refrigeration or steam, for sale, by manufacturing, processing, assembling, generating, refining, mining, extracting, farming, agriculture, horticulture or floriculture, shall be exempt from the taxes imposed under subdivisions (a) and (b) of section eleven hundred five and the compensating use tax imposed under section eleven hundred ten."

B. The Audit Division properly denied exemption from sales tax with respect to the electricity consumed by petitioner's scale/pricer and wrapper. Both of these items aided petitioner in the distribution and selling of its produce (see ___, Matter of APOG Foods, Inc., State Tax Commn., October 15, 1986). Neither changed the nature, shape or form of the produce (see ___, 20 NYCRR 531.2[e]). Thus, petitioner has not demonstrated that the scale/pricer and wrapper were used in the production of tangible personal property (Matter of Klein's Bailey Foods, Inc., Tax Appeals Tribunal, August 4, 1988).

With respect to the use of the scale/pricer and wrapper in making salads, petitioner failed to show how these two items were used in the making of salads. Moreover, it cannot be discerned from the record whether such produce was sold in such a manner as would preclude an exemption (see, Matter of Burger King v. State Tax Commn., 51 NY2d 614) or whether such

produce was sold in a state which would render the food exempt from tax (Tax Law § 1105[d]) and permit an exclusion from sales tax (Matter of Klein's Bailey Foods, Inc., supra).

C. With respect to petitioner's meat prep room, meat cooler, produce prep room and produce cooler, a determination as to whether electricity consumed by such equipment should properly be granted exemption pursuant to Tax Law § 1115(c) is not reached herein because petitioner failed to present any evidence as to the amount of electricity consumed by such equipment during the period at issue. There is therefore no reason to disturb the Audit Division's denial of exemption with respect to the "meat prep & cooler/produce cooler" as set forth in petitioner's survey.

D. Petitioner has failed to show that the hours of operation of equipment in its meat and deli/bakery departments were understated on its survey. It is noted that the Audit Division, in making its determinations, accepted the hours of operation set forth in petitioner's survey. The record indicates that the meat and deli/bakery departments operated for certain hours each day (Finding of Fact "8"). The record does not indicate any hours of operation of particular pieces of equipment other than that set forth in the survey. Petitioner has thus not presented any evidence which would show that the equipment in question was used for a greater period of time than that permitted by the Audit Division.

E. The Audit Division improperly rejected petitioner's kilowatt-hours figures set forth in its respective surveys. In light of the professional expertise of Energy & Value Consultants, Inc. (Finding of Fact "14"), and the basis for the figures set forth in the survey (Findings of Fact "15" and "16"), petitioner has established that its kilowatt-hours figures were more accurate than those arrived at via the formulas employed by the Audit Division. Also supportive of this conclusion is the fact that the Audit Division accepted petitioner's kilowatt-hours figures with respect to 13 of the 23 pieces of electrical equipment with respect to which exemption was granted.

In addition to the accuracy of petitioner's figures and the inconsistency of the Audit Division's figures (Finding of Fact "12"), the well-established preference for using calculations prepared by an engineering professional rather than the formulas utilized by the Audit Division herein is noted. In fact, the Audit Division's own Technical Services Bureau Memorandum (TSB-M-82[25]S) expresses this preference as follows:

"When claiming a refund or credit of sales taxes paid on exempt purchases, an electrical engineer's survey, showing computations, must be submitted in substantiation of the allocation made for use of electricity for both exempt and taxable purposes. In lieu of an electrical engineer's survey, computations using the guidelines that follow may be submitted." (Emphasis supplied.)

It is further noted that this preference was affirmed in Grand Union Co. v. Tully (94 AD2d 509).

F. The Audit Division's denial of exemption for gas consumed in the heating of water was proper. The record does not show what portion of hot water was used in production and what portion was used for sanitation and other purposes. Absent such a showing, the exemption was properly denied, for utilities consumed in the heating of water are not exempt if used for sanitation purposes (see ___, Matter of Wehrle Drive Supermarket, State Tax Commn., December 14, 1982).

G. Petitioner has failed to show wherein the Audit Division's computations of petitioner's

exemption for natural gas consumed in production was improper. The Audit Division used petitioner's calculation of the daily cost to petitioner of natural gas as the basis of its computations. Although, as petitioner contended, the cost of natural gas may have risen following the submission of the survey, petitioner failed to submit sufficient information pertaining to such costs as would warrant an increase in its exemption for natural gas consumed in production.

H. The petition of Avery's Market, Inc. is granted to the extent indicated in Conclusion of Law "E"; the Audit Division is directed to recompute the Notice of Determination and Demand for Payment of Sales and Use Taxes Due herein in accordance therewith; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
December 15, 1988

/s/ Timothy J.

Alston _____
ADMINISTRATIVE LAW JUDGE